Supreme Court, U.S.
FILED

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No.

Supreme Court of the United States

KEITH NASS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEITH NASS
% Vickie Nass
1623 Colfax Ave
Grand Haven, MI
49417

QUESTIONS PRESENTED

1.) Whether, as the Courts of Appeals for the Seventh, Tenth, and Eleventh Circuits have held, in conflict with the decision below and decisions of the Ninth Circuit, the sufficiency of the evidence of violation of 26 U.S.C. § 5861(d) requires proof *beyond a reasonable doubt* that the defendant knew a firearm he possessed was a machine gun?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit.

More specifically, the Petitioner Keith Nass and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	Page:
Question Presented	i
List of Parties to the Proceedings in the Courts Below	ii
Table of Contents	iii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	3
Statement of the Case	4
Reasons for Granting the Writ	12
1.) THIS COURT SHOULD GRANT MR. NASS' PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS THE PROPER APPLICATION OF THE MENS REA REQUIREMENT OF 26 U.S.C.S. § 5861(D) AND 18 U.S.C. § 922(O)	**12**
1A.) The Federal Court's Of Appeals Are Divided On The Proper Application Of The Mens Rea Requirement Of 26 U.S.C.S. § 5861(d) And 18 U.S.C. § 922(o)	**14**
1B.) Had The Lower Courts Properly Applied This Court's *Staples* Decision, Mr. Nass Would Have Been Acquitted For Insufficiency Of The Evidence	**16**
Conclusion	18

Appendix 19
USCA Opinion Dated 6-3-04 ..... A
USDC Judgment & Commitment Order
Entered 2-5-03 ..... B

TABLE OF AUTHORITIES

Page:

Cases

Braxton v. United States,
500 U.S. 344,
114 L.Ed.2d 385, 111 S.Ct. 1854 (1991) *15, 17*

Lawrence v. Chater,
516 U.S. 163, 167-68, 133 L. Ed. 2d 545,
116 S. Ct. 604 (1996) *18*

Montana v. Hall,
481 U.S. 400, 406,
95 L.Ed.2d 354, 107 S.Ct. 1825 (1987)..... *15, 17*

Staples v. United States,
511 U.S. 600, 621-22, 128 L. Ed. 2d 608,
114 S. Ct. 1793 (1994)..... *11, 14, 18*

Stinson v. United States,
508 U.S. ___, ___, and [n.],
123 L.Ed.2d 598, 605 and [n. 2],
113 S.Ct. 1913 (1993) *15, 17*

United States v. Edwards,
90 F.3d 199; 1996 U.S. App. LEXIS 17623
(7th Cir. 1996)..... *14, 17*

United States v. Gravenmeir,
121 F.3d 526; 1997 U.S. App. LEXIS 21036
(9th Cir. 1997)..... *14*

United States v. Mendoza,
464 U.S. 154,
78 L.Ed.2d 379, 104 S.Ct. 568 (198) *15, 17*

United States v. Rogers,
94 F.3d 1519; 1996 U.S. App. LEXIS 24311
(11th Cir. 1996)..... *14, 17*

United States v. Sanders,
240 F.3d 1279; 2001 U.S. App. LEXIS 2974
(10th Cir. 2001)..... *14, 17*

United States v. Syverson,
90 F.3d 227; 1996 U.S. App. LEXIS 17786
(7th Cir. 1996) *15*

Statutes

18 U.S.C. § 921(a)(23) *4, 5*
18 U.S.C. § 922(o) *3, 4, 5,15*
18 U.S.C. § 924(a)(2) *4, 5*
26 U.S.C. § 5841(a) *4, 5*
26 U.S.C. § 5845(a)(7) *5*
26 U.S.C. § 5861(d) ..... *passim*
26 U.S.C. § 5871 ..... *4, 5*
26 U.S.C. §§ 5845(a)(6) *4, 5*
28 U.S.C. § 1254(1) *2*

Rules

Fed. R. Crim. Proc. 29 ..... *8*
Supreme Court Rule 10 ..... *12, 13*
Supreme Court Rule 10(a) *15, 17*

PETITION FOR A WRIT OF CERTIORARI

Keith Nass, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on 6-3-04.

OPINIONS BELOW

The 6-3-04 opinion of the Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2004 U.S. App. LEXIS 11184, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Western District Of Michigan, entered on 2-5-03, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 6-3-04. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

18 U.S.C. § 922(o) provides:

> (o) (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to--
>
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect [effective May 19, 1986]. *Id.*

26 U.S.C. § 5861(d) provides:

> It shall be unlawful for any person--
>
> ...
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; *Id.*

STATEMENT OF THE CASE

On 5-16-02, Petitioner Keith Nass was charged in a superseding indictment as follows:

> COUNT 1
>
> (Possession of an Unregistered Machinegun)
>
> From on or about March 1, 2001 to on or about March 7, 2002, in Grand Haven, Ottawa County, in the Southern Division of the Western District of Michigan, KEITH W. NASS knowingly possessed a machinegun not registered to him in the National Firearms Registration and Transfer Record, namely an Uzi, 9 mm fully automatic pistol. 26 U.S.C. § 5861(d); 26 U.S.C. § 5841(a); 26 U.S.C. §§ 5845(a)(6), (b); 26 U.S.C. § 5871
>
> COUNT 2
>
> (Possession of a Machinegun)
>
> From on or about March 1, 2001 to on or about March 7, 2002, in Grand Haven, Ottawa County, in the Southern Division of the Western District of Michigan, KEITH W. NASS knowingly possessed a machinegun, namely an Uzi, 9 mm fully automatic pistol. 18 U.S.C. § 922(o); 18 U.S.C. § 921(a)(23); 18 U.S.C. § 924(a)(2)
>
> COUNT 3
>
> (Possession of an Unregistered Silencer)
>
> From on or about March 1, 2001 to on or about March 7, 2002, in Grand Haven, Ottawa County, in the Southern Division of the Western District of Michigan, KEITH W. NASS knowingly possessed a silencer not registered to him in the National Firearms Registration and Transfer Record. 26 U.S.C. §

5861(d); 26 U.S.C. § 5841(a); 26 U.S.C. § 5845(a)(7); 26 U.S.C. § 5871

COUNT 4

(Possession of an Unregistered Machinegun)

On or about March 17, 2002, in Grand Haven, Ottawa County, in the Southern Division of the Western District of Michigan, KEITH W. NASS knowingly possessed a machinegun not registered to him in the National Firearms Registration and Transfer Record, namely a Frankford Arsenal, Inc., AR-15 type, Model XM-16, fully automatic rifle. 26 U.S.C. § 5861(d); 26 U.S.C. § 5841(a); 26 U.S.C. §§ 5845(a)(6), (b); 26 U.S.C. § 5871

COUNT 5

(Possession of a Machinegun)

On or about March 17, 2002, in Grand Haven, Ottawa County, in the Southern Division of the Western District of Michigan, KEITH W. NASS knowingly possessed a machinegun, namely a Frankford Arsenal, Inc., AR-15 type, Model XM-16, fully automatic rifle. 18 U.S.C. § 922(o); 18 U.S.C. § 921(a)(23); 18 U.S.C. § 924(a)(2)

(Superseding Indictment Filed 5-16-02)

These charges arose after Petitioner made a complaint to the local police department about some guns that were missing from his collection.

Petitioner proceeded to trial by jury.

At trial, Grand Haven Department of Public Safety Officer Michael Ercole testified that he was called to investigate a complaint made by Mr. Nass concerning the theft of several firearms from his collection. (TR-82) (JA-

112)[1]. Ercole stated that Mr. Nass reported having problems with his son, Hans Nass, and he was worried about him and one of the guns that was still missing. (TR-83) (JA-113). Mr. Nass found 3 of the 4 firearms under a cabinet in their basement. (TR-84) (JA-114).

Officer Ercole and Mr. Nass went downstairs into the basement to confront Hans about the missing handgun. (TR-85) (JA-115). Officer Ercole looked around the basement. (TR-89) (JA-118). Indeed, Mr. Nass showed the police officer around the basement pointing out a gun cabinet that contained miscellaneous gun parts, guns and ammunition. (TR-89) (JA-118). The officer was not prevented from going into any portion of the basement and basically was allowed to look anywhere he desired. (TR-95) (JA-119).

Mark Reiss, a sergeant with the Grand Haven Department of Public Safety, was the lead supervising police officer who searched the Nass home and took several statements from Mr. Keith Nass. (TR-163) (JA-127). At approximately 6:00 a.m., he and several other police officers went to the Nass home. (TR-165) (JA-129). He wanted to confront Mr. Keith Nass on why Mr. Nass had not reported an UZI and Silencer stolen in his March 7, 2002 report to Officer Ercole. (TR-166) (JA-130). He wanted to find out why Mr. Nass only reported four handguns as stolen. (TR-166) (JA-130). He also wanted to determine if Mr. Nass had a federal firearms license. (TR-166) (JA-130).

Therefore, at 6:00 a.m. Sgt. Reiss and other officers woke Mr. Nass from his sleep. (TR-166) (JA-130). After making contact with Mr. Nass, they went into the kitchen where Sgt. Reiss began to question Mr. Nass about the UZI and silencer. (TR-168) (JA-131). After a discussion about the UZI and silencer, Sgt. Reiss' attention turned towards the other firearms in the Nass home.

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[1] This refers to trial transcript page 82 which appears on page 112 of the USCA Joint Appendix.

Reiss asked Mr. Nass if they could take the firearms back to the police department to confirm their registrations and to confirm that there were no other illegal firearms in that collection. (TR-171) (JA-134). Mr. Nass "consented" gave his permission for the police to take the guns to the department. (TR- 17 I) (JA-134). Reiss then became overwhelmed by the number of firearms. (TR-171) (JA-134). Thereafter Mr. Nass assisted the police officers in logging and loading the firearms into police vehicles. (TR-173) (JA-136).

Sgt. Reiss did not have much training in firearms, (TR-174) (JA-282), so he turned to Officer Kibart, who had a little more training in firearms to assist him in inspecting and processing them. (TR-174) (JA-282). Some of the firearms had their registration papers attached to them and others did not. (TR-174) (JA-282). The police wanted to run LEIN checks on all of the serial numbers to determine if any were stolen. A LEIN check is a computer check through the law enforcement network which stores information about firearms that are listed as stolen. (TR-174) (JA-282). The firearms were collected and transported to the Grand Haven Department of Public Safety. (TR-175-177) (JA-283), 284, 137.

Sgt. Reiss admitted on cross-examination that he was concerned about the firearms just simply based on the number (48) Mr. Nass possessed. (TR-197) (JA-139).

He further indicated that he did not know if Mr. Nass owned all of the firearms taken from the home. (TR-202) (JA-140). *Sgt. Reiss testified that he and Officer Kibart examined the firearms and none of them appeared to be altered.* (TR-202) (JA-140).

Another officer from the Grand Haven Department of Public Safety was called to testify for the Government, Officer Christopher Wright. He testified that he did the inventory of the 48 firearms taken from the Nass home. *He stated, as did the other police officers, that a person could*

not tell if a firearm was fully automatic simply by looking at one. (TR- 17, Vol. III) (JA-236).

One final witness, Sgt. Jeffery Crump, a lab agent for the Michigan State Police testified that *he discovered, by surprise, that one of the firearms, Exhibit 3, the Frankfort Arsenal AR-15 was a fully automatic machinegun.* (TR-20-2I) (JA-169-170). He was actually checking the ballistics of the AR-15 to determine if it may have been involved in any open shootings. (TR-20) (JA-169). That process involves firing the firearm and retrieving the projectile, bullet. Then a comparison is done on the bullet to determine if it matches any bullet with similar characteristics that had been involved in an unsolved shooting. Exhibit 3 was not involved in any open cases. (TR-20) (JA-169). After Sgt. Crump testified, the Government rested and closed its case-in-chief. (TR-3 I) (JA-173).

The defense moved pursuant to Fed. R. Crim. Proc. 29, for a Judgment of Acquittal on Counts IV and V. (TR-31) (JA-173). More specifically, defense counsel argued as follows:

> MR. GERMAN: Your Honor, this is, pursuant to the Federal Rules, a motion for judgment of acquittal. Specifically, your Honor, on Count Number V dealing -- Counts IV and V dealing with the AR-15, and I request that the Court direct the verdict or enter a judgment of acquittal on those two counts because there has been no evidence presented whatsoever that this particular firearm belongs to Mr. Nass or that otherwise any type of evidence connecting that firearm to Mr. Nass and his knowledge or presumed knowledge of the way that this particular firearm operated.
>
> Basically, the evidence before the Court in the [32] record, as the Court knows, is simply that this particular firearm was found

> in the basement of the Nass home. There were other persons present during that time. There had been no admissions by Mr. Nass with respect to Counts IV and V as there presumably may have been -- at least from the record standpoint with respect to the Uzi.
>
> There has been no testimony about any ownership, as I've indicated, and that the government must prove that he, the defendant, possessed it and that he knew that it was a machine gun. And there is simply no evidence before the jury that would allow them to make that decision. Certainly they could speculate, but that's not what we want juries to do. We want them to decide on evidence, and there is simply no evidence supporting Counts IV and V.

(Tr. 9-18-02, pages 31-32)

The Court denied Petitioner's motion. (TR-35) (JA-286).

Counsel for Petitioner then presented the defense case. The defense consisted of two witnesses, Officer Kibart and the Defendant, Keith Nass. Officer Kibart was called first. (TR-36) (JA-190) Among other things, Officer Kibart testified that he examined all of the other firearms taken from the Nass basement. (TR-43) (JA-191). He examined the firearms specifically looking to see if any of the other firearms had been converted to a machinegun. (TR-43) JA-191. *His examination revealed none of the other firearms, including Exhibit 3, was tampered with or converted to be a machinegun.* (TR-43) (JA-191).

Petitioner Keith Nass testified on his own behalf. (TR-60) (JA-196). He testified that he was not a white supremacist, terrorist, survivalist or any other type of militant person. (TR-62-63) (JA-198-199). He considered himself to be a gun collector, who collected mostly military firearms. (TR-62) (JA-198). He did not consider himself to be a

gunsmith but had a basic understanding of how certain firearms worked. (TR-63 - 64) (JA-199-200).

Mr. Nass testified that he owned 3 of the AR-15's and none of them were fully automatic. (TR-64) (JA-200). He had not fired his AR-15's for over 15 years. (TR-64) (JA-200). At one point he had one that misfired, a double fire. So he took it to a gunsmith who took care of the problem. (TR-64) (JA-200). He could not identify which of the three AR-15's was the one that misfired. (TR-64) (JA-200). He further indicated that none of the AR-15's in his basement ever fired fully automatic. (TR-68) (JA-202). He never tried to make any of them fire fully automatic. (TR-68) (JA-202). He testified that at one point he participated in competitive shooting, where he shot one of his AR-15's. (TR-70) (JA-204). Those competitions did not involve shooting in a fully automatic mode. (TR-70) (JA-204).

At the end of Mr. Nass' testimony, the defense rested its case-in-chief and renewed its Motion for Judgment of Acquittal. (TR-131) (JA-163). The Court once again denied the motion. (TR-132) (JA-164).

The Jury was instructed and sent out to deliberate. The Jury asked a number of questions by sending the Court a note. The Jury sent out a total of 10 notes.

On 9-19-02, at the end of 4 days of trial, the jury returned verdicts of NOT GUILTY as to Counts 1-3 and verdicts of GUILTY as to Counts 4-5, the Counts involving the altered AR-15.

On 2-4-03, Petitioner was sentenced to serve 27 months incarceration plus 2 years supervised release, $6,000.00 fine and $200.00 special assessment. (Appendix B)[2]

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[2] While Petitioner has almost finished his sentence of incarceration, his monetary penalties and supervised release preclude a finding that the case is "moot". See *Oyler v. Allenbrand*, 23 F.3d 292, 293-94 (10th Cir. 1992).

On appeal, counsel renewed his argument that the evidence was insufficient for conviction of Petitioner as to Counts 4-5. Counsel specifically argued that the evidence of Petitioner's knowledge that the AR-15 fell into the category of a "machine gun" was insufficient under *Staples v. United States*, 511 U.S. 600, 621-22, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994).

On 6-3-04, the Court of Appeals denied Petitioner's appeal. In denying the appeal, the lower court held that Petitioner's general knowledge of guns and expressed desire to legally own a machine gun, together with the fact that police had discovered the full automatic capability of the AR-15, was sufficient to support the conviction. (Appendix A)

Mr. Nass demonstrates within that this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals The Proper Application Of The Mens Rea Requirement Of 26 U.S.C.S. § 5861(d) And 18 U.S.C. § 922(o).

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. NASS' PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS THE PROPER APPLICATION OF THE MENS REA REQUIREMENT OF 26 U.S.C.S. § 5861(D) AND 18 U.S.C. § 922(O).

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call

> for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) The Federal Court's Of Appeals Are Divided On The Proper Application Of The Mens Rea Requirement Of 26 U.S.C.S. § 5861(d) And 18 U.S.C. § 922(o).

As set forth in the Statement of the Case, supra, the Court of Appeals for the Sixth Circuit held that Petitioner's general knowledge of guns and expressed desire to legally own a machine gun, together with the fact that police had discovered the full automatic capability of the AR-15, was sufficient to support the conviction. (Appendix A) This was in spite of the fact that several police inspected the firearm and did not notice that the firearm had been altered in any way from semi-automatic.

This decision by the Sixth Circuit directly conflicts with the decisions of the Seventh Circuit in *United States v. Edwards*, 90 F.3d 199; 1996 U.S. App. LEXIS 17623 (7th Cir. 1996) and the Tenth Circuit in *United States v. Sanders*, 240 F.3d 1279; 2001 U.S. App. LEXIS 2974 (10th Cir. 2001) and the Eleventh Circuit in *United States v. Rogers*, 94 F.3d 1519; 1996 U.S. App. LEXIS 24311 (11th Cir. 1996)

The decisions of the foregoing Courts of Appeals have unequivocally determined, contrary to the decision of the Sixth Circuit[3], that this Court's decision in *Staples v. United States*, 511 U.S. 600, 621-22, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994), holds that there must be more than 'inference' to support the mens rea requirement of knowledge that a firearm constituted a machine gun in order to convict a defendant under 26 U.S.C. § 5861(d).[4]

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[3] The Ninth Circuit also follows the Sixth Circuit on this issue. See *United States v. Gravenmeir*, 121 F.3d 526; 1997 U.S. App. LEXIS 21036 (9th Cir. 1997).

[4] This mens rea requirement for 26 U.S.C. § 5861(d) is considered by the courts to be applicable also to 18 U.S.C. §

The split in the circuits is clear cut and the opposing positions are hardening instead of harmonizing. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See Supreme Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95 L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (198); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States*, 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

922(o). See *United States v. Syverson*, 90 F.3d 227; 1996 U.S. App. LEXIS 17786 (7th Cir. 1996).

1B.) Had The Lower Courts Properly Applied This Court's *Staples* Decision, Mr. Nass Would Have Been Acquitted For Insufficiency Of The Evidence.

As set forth in the statement of the case, supra, the testimony at trial was that Sgt. Jeffery Crump, a lab agent for the Michigan State Police, testified that *he discovered, by surprise, that one of the firearms, Exhibit 3, the Frankfort Arsenal AR-15 was a fully automatic machinegun.* (TR-20-2I) (JA-169-170). Additionally, Officer Kibart testified that he examined all of the other firearms taken from the Nass basement. (TR-43) (JA-191). He examined the firearms specifically looking to see if any of the other firearms had been converted to a machinegun. (TR-43) JA-19 1. *His examination revealed none of the other firearms, including Exhibit 3, was tampered with or converted to be a machinegun.* (TR-43) (JA-191).

Mr. Nass testified that he did not consider himself to be a gunsmith but had a basic understanding of how certain firearms worked. (TR-63 - 64) (JA-199-200). He testified that he owned three of the AR-15's and none of them were fully automatic. (TR-64) (JA-200). He had not fired his AR-15's for over 15 years. (TR-64) (JA-200). At one point he had one that misfired, a double fire. So he took it to a gunsmith who took care of the problem. (TR-64) (JA-200). He could not identify which of the three AR-15's was the one that misfired. (TR-64) (JA-200). He further indicated that none of the AR-15's in his basement ever fired fully automatic. (TR-68) (JA-202). He never tried to make any of them fire fully automatic. (TR-68) (JA-202). He testified that at one point he participated in competitive shooting, where he shot one of his AR-15's. (TR-70) (JA-204). Those competitions did not involve shooting in a fully automatic mode. (TR-70) (JA-204).

There was no direct evidence that Mr. Nass was aware that the one AR-15 had been converted to fire fully automatic, thereby falling within the definition of a machine gun.

In the Seventh, Tenth, and Eleventh Circuits, Mr. Nass would have been acquitted in his Rule 29 motion. *United States v. Edwards,* 90 F.3d 199; 1996 U.S. App. LEXIS 17623 (7th Cir. 1996); *United States v. Sanders,* 240 F.3d 1279; 2001 U.S. App. LEXIS 2974 (10th Cir. 2001); *United States v. Rogers,* 94 F.3d 1519; 1996 U.S. App. LEXIS 24311 (11th Cir. 1996).

The Sixth Circuit, by contrast, held that the inferences were sufficient to support conviction. (Appendix A) As set forth above, the outcome of litigation should not depend on the location of the court in which it occurs. Supreme Court Rule 10(a). *Montana v. Hall,* 481 U.S. 400, 406, 95 L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza,* 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (198); *Braxton v. United States,* 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States,* 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States,* 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Sixth Circuit in Mr. Nass' case.

CONCLUSION

For all of the foregoing reasons, Petitioner Keith Nass respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[5] to the court of appeals for reconsideration in light of *Staples v. United States*, 511 U.S. 600, 621-22, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994).

KEITH NASS
% Vickie Nass
1623 Colfax Ave
Grand Haven, MI 49417

Date: _____

[5] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

KEITH NASS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Keith Nass and submits the attached appendix pursuant to Supreme Court Rules.

KEITH NASS
% Vickie Nass
1623 Colfax Ave
Grand Haven, MI 49417

Date:_____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED 6-3-04

2004 U.S. App. LEXIS 11184, *

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEITH W. NASS, Defendant-Appellant.

No. 03-1186

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2004 U.S. App. LEXIS 11184

June 3, 2004, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: On Appeal from the United States District Court for the Western District of Michigan. 02-00063. Miles. 02-12-03.

DISPOSITION: Affirmed.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Andrew B. Birge, U.S. Attorney's Office for the Western District of Michigan, Grand Rapids, MI.

For KEITH W. NASS, Defendant - Appellant: Robert H. German, German & German, Spring Lake, MI.

JUDGES: Before: BOGGS, Chief Judge; NELSON and SUTTON, Circuit Judges.

OPINION: PER CURIAM. Defendant Keith Nass appeals from the district court's denial of his motion for judgment notwithstanding the verdict after a jury found him guilty of possession of an unregistered machine gun, in violation of 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(d). For the following reasons, we affirm.

I

Keith Nass came to the attention of the Grand Haven, [*2] Michigan, police force with respect to his teenage son's

possession of an Uzi machine gun with silencer. When questioned, Nass admitted that he owned such a weapon and knew that his ownership was illegal He agreed to turn over his extensive collection of firearms and spare parts so that the police could verify his lawful ownership of those weapons At the police station, Sergeant Jeffrey Crump, who is not an expert on machine guns, ran ballistics checks on the weapons. When he came to one of Nass' three Frankford Arsenal AR-15 rifles, he noticed at first glance that it had a three-position selector switch: safe, semi-automatic, and unmarked. Sgt. Crump correctly deduced that the third setting was for fully automatic fire, so that this apparent AR-15 was in fact an unregistered machine gun.

An AR-15 easily can be and often is converted into a machine gun using simple tools and legally-purchased M-16 parts. The Government showed at trial that this AR-15 had been so modified, and that Nass' collection included an M-16-style bolt carrier. Nass testified that he did not know how to convert an AR-15 to an M-16, and would never do it, and that he had not known that his gun was converted. [*3] But he also testified that he had always wanted to own a machine gun. He exhibited at least some knowledge about the inner design of M-16s and AR-15s.

While the jury was deliberating, it asked the trial judge whether there was testimony that Nass' three AR-15s. including the machine gun. were registered ("Note 6"). Construing Note 6 as a query about proof of ownership. Nass asked for an instruction to the effect that the weapons were not registered as machine guns with the Bureau of Alcohol, Tobacco, and Firearms, but that the two unmodified AR-15s had been traced through the ATF's registration records and found to have been legally purchased by Nass. Although these facts had been disclosed to Nass before the trial, and one witness had discussed tracing procedures, neither party had introduced evidence about tracing those particular guns. The trial judge simply instructed the jury that "tracing" was not the same as "registration" and that whether the other two

AR-15s were registered was not at issue. The jury later repeated the question as to only those two AR-15s ("Note 7"). It added, "if he registered the 2 legal ARs but not the illegal one it indicates he knew it was illegal" [*4] ("Note 8"). The trial judge responded that there were no charges as to the other AR-15s and no evidence as to whether those weapons were registered, and that he "should not be expected to answer" Note 8.

Nass was acquitted as to the Uzi rifle, and was convicted as to the modified AR-15. He moved unsuccessfully for acquittal notwithstanding the verdict. On appeal, Nass argues that the Government failed to prove scienter, and that the trial court's refusal to give his requested jury instruction was reversible error.

II

We review the sufficiency of the evidence of Nass' guilt de novo. United States v. Tocco, 200 F.3d 401, 424 (6th Cir. 2002). The evidence is sufficient if any rational factfinder could have found each essential element of Nass' offense beyond a reasonable doubt. Ibid.

The only element Nass challenges is scienter. Because an apparently innocent rifle can be converted into an illegal machine gun with no outward sign, scienter as to this crime may not be inferred merely from possession: the Government must prove that the defendant knew the rifle was a machine gun. *Staples* v. United States, 511 U.S. 600, 621-22, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994). [*5] Here, the Government showed more than enough for a jury to find scienter. The Government showed that even a non-expert had quickly noticed the selector switch on the modified AR-15 and deduced its purpose, that Nass stored the otherwise-inexpensive modified AR-15 in the same locked cabinet as his prized rare Lugers, that Nass was very familiar with his own collection, that he was familiar with the design of AR-15s and M-16s. that he owned an M-16 spare part that could be used for conversion, and that he admitted to illegal

possession of the Uzi machine gun. Nass' challenge is bootless.

III

Nass' attempt to find error in the trial court's refusal of his proposed jury instruction is equally unfounded. We review this decision for abuse of discretion. United States v. Ricketts, 317 F.3d 540, 544 (6th Cir. 2003). A conviction may be reversed only if all the jury instructions, "viewed as a whole, were confusing, misleading, and prejudicial." United States v. Wells, 211 F.3d 988, 1002 (6th Cir. 2000). We ask whether the refused instruction states the law correctly, is not redundant, and "concerns an important point which impairs the defendant's [*6] theory of the case." Ricketts, 317 F.3d at 544.

Nass reasons that Note 8 shows that the jury found him guilty based on an error of fact that the trial judge could have easily remedied by an instruction that all three weapons had been legally purchased. Because the jury relied so heavily on this one point, Nass urges, the judge's failure to clear it up tainted the instructions as a whole.

Nass simply misrepresents the record. The record does not show that Nass requested an instruction that he had legally purchased all three AR-15s. Rather, he asked for an instruction that he had legally purchased the two AR-15s as to which no charge was brought. The trial judge made no error in refusing that request, because admitting new evidence during deliberation would have been an extraordinary departure from normal trial procedure, not justified by whatever slight relevance Nass' lawful purchase of those two weapons may have had. Indeed, introducing new evidence would not have been responsive to Note 6, which asked whether there was "testimony" that Nass' AR-15s were registered. Moreover, even if there had been testimony to support the facts set forth in Nass' proposed instruction, [*7] those facts would have supported the apparently-incriminating reasoning set forth in Note 8. Far from being essential to Nass' theory of the case, or prejudicial by its

absence, the proposed instruction could have harmed Nass. The trial judge adequately and fairly responded to the jury's queries within the limits set by the trial record.

IV

Because there was sufficient evidence to support conviction, and because the district court made no error in rejecting Nass' proposed jury instruction, we AFFIRM the judgment of the district court.

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
ENTERED 2-5-03

ENTERED FEBRUARY 05, 2003
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
Holding Session in Houston
JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,
v.
KEITH W. NASS

Case Number: 1:02-CR-63-01

Defendant's Attorney: Robert H. German

THE DEFENDANT:
[] pleaded guilty to Court
[] pleaded nolo contendere to count(s)__ which was accepted by the court.
[x] was found guilty on count(s) 4 and 5 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offences:

Title & Section: 26 U.S.C. §5861(d)
Nature of Offense: possession of an Unregistered Machine gun
Date Offense Concluded: 03/17/2002
Count Number(s): 4
Title & Section: 18 U.S.C. §922(o)
Nature of Offense: Possession of a Machine gun
Date Offense Concluded: 03/17/2002
Count Number(s): 5

The defendant is sentenced as provided in pages 2 through 6 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on count(s) 1, 2, and 3.
[] Count(s) (is) (are)dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgement: February 4, 2003

Defendant's Social Security No.: XXX-XX-0082
Defendant's Date of Birth: 03/07/1943
Defendant's US Marshal's No.: 10866-040

Defendant's Address: 1623 Colfax Ave., Grand Haven, MI 49417-2056

HON. GORDON J. QUIST
U. S. DISTRICT JUDGE

IMPRISONMENT
The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of twenty-seven 27 months on each of Counts Four and Five, to run concurrently.

[x] The Court makes the following recommendations to the Bureau of Prisons:

The defendant has a severe diabetic condition and needs special medical care. I recommend that he be placed in a medical facility.

[x] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district
[ ] at _ a.m./ p.m. on _
[ ] as notified by the United States Marshal.
[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before 2 p.m. on ___
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN
I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

SUPERVISED RELEASE
Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years on each of Counts Four and Five, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenders qualifying for collection of a DNA sample pursuant to Section 3 of the DNA Analysis Backldog Elimination Act of 2000:
[ ] The defendant shall cooperate in the collection of DNA as directed by their probation officer.

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests within 60 days.
[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

For offenders convicted of a domestic violence crime defined in 18 U.S.C. §3561(b):
[ ] The defendant shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, it an approved program is available within a 50 mile radius of the legal residence of the defendant.

For offenders described in 18 U.S.C. §4042(o)(4) who committed offenses after November 26, 1998:
[ ] The defendant shall report the address where they will reside and any subsequent change of residence to the

probation officer responsible for supervision, and shall register as a sex offender in the state where the defendant resides, is employed, carries on a vocation, or is a student.

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court and shall also comply with the special conditions of supervision set forth on the attached page(s).

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2. the defendant shah report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6. the defendant shall notify the probation officer at least fifteen days prior to any change m residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.
2. The defendant shall participate in a program of mental health, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability as determined by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

Assessment	Fine	Restitution
Totals:	$200.00	$6.000.00
	($100 ea. Count)	($3,000 ea. Count)

[ ] The determination of restitution is deferred until _____. An Amended Judgement in a Criminal Case (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$0.00	$0.00	

[ ] If applicable, restitution amount ordered pursuant to plea agreement $_____

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgement, pursuant to 18 U.S.C. §3612(f). All of the payment options

on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[x] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[x] the interest requirement is waived for the [x] fine and/or [ ] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shell be due as follows:

A [x] Lump sum payment of $200.00 due immediately, balance due

[ ] not later than -----, or

[ ] in accordance with [] C, [] D, or [] E below; or

B [ ] Payment to begin immediately (may be combined with [] C, [] D, or [] E below); or

C [ ] Payment in ___ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgement; or

D [ ] Payment in ___(e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [x] Special instructions regarding the payment of criminal monetary penalties:

While defendant is incarcerated, the fine shall be paid in monthly installments of $20.00 to commence six months after the date of this judgement. Payments after defendant's release to supervised release shall be determined by the defendant's probation officer based upon defendant's income, earning ability and assets. Yhe balance of the fine is to be paid in full prior to the expiration of supervision release.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan, NW, Grand Rapids, Michigan 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, and (2) fine principal.